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"THE LAW" AND THE LAW OF CHANGE

By
NATHAN ISAACS
CINCINNATI LAW SCHOOL

REPRINTED FROM
UNIVERSITY OF PENNSYLVANIA LAW REVIEW
VOL. 65, MAY AND JUNE, 1917

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"THE LAW" AND THE LAW OF CHANGE.

A Tentative Study in Comparative Jurisprudence.

*Introduction.**

"The Law"—let us rather say Torah. For Torah, literally teaching, denotes the whole of what has been revealed to Israel throughout the ages—the teaching of the right way of living. The rabbis of the Talmud speak of "two Torahs": the Holy Scriptures or written law, which is the foundation, and the oral tradition or unwritten law, which is the development. Or: the Torah explicit, and the Torah implicit. The Old Testament moulded the Jew's faith, but it did not restrain his thoughts. Though in theory the legal canon was closed forever, it did not in fact prevent Israel from interpreting and developing its laws and precepts with life-giving freedom. Post-Biblical Jewish law actually went beyond Scripture. New provisions had to be created to meet new conditions which could not have been foreseen. The Scribes and, later, the rabbis, for political, national and—natural reasons, endeavored to create, by legal fictions, by equity and by legislation, a "hedge round the Torah," a "chain of tradition." The "law of change"—a law of nature—was thus obeyed by "Catholic Israel." The cry, "Back to Moses," of the short-sighted Sadducees was answered by attempts to commit to writing the oral law, out of which attempts the Mishnah, the first post-Biblical code, was compiled, and about which, for the same natural reasons, grew up the Gemara—the two making the Talmud, properly so called. Compiled, sifted and committed to writing, it failed to answer all the questions that changed conditions suggested. The "Responses" of the Geonim mark the beginning of post-Talmudic legal activity which is still going on. The "second Torah," written and still being written down, has not ceased to be designated as the oral law.

As the Old Testament is a combination of precept and narrative, so is the Talmud no mere law-book compiled by jurists.

*By Adolph S. Oko, Librarian, Hebrew Union College.

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Broadly, the Talmudic literature is characterized as Halakhah (way of life, laws) and Haggadhah (narrative, instruction or homily). We should further bear in mind that among the Jews the distinction between religious and secular law was not known. The division by scholars of the Mosaic legislation into moral, ritual and legal laws is wholly arbitrary. Such distinctions are of a comparatively late origin even in Western Europe.

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Modern Old Testament scholarship sees in Biblical legislation not the product of one author or of one generation, but of centuries. Like all law, it was a growth—an expression of Israel's national life. It passed through the various law-stages which Sir Henry Maine observed in the historic development of Roman and Indian law: from the unwritten to the written, from the formal to the equitable, and so on. Maine in his *Ancient Law,* it would seem, has deliberately avoided drawing illustrations for his principle of legal development from Biblical legislation. The literature on the subject that has grown up since Maine's day concerns itself with the sources and the forms of Biblical laws, with questions of origin and growth or, since the discovery of the Hammurabi Code especially, with their relation to other Semitic legislation, and is in the main the work of archaeologists and Semitists, and not of jurists. From the latter we have but a few monographs on special legal provisions and some occasional remarks on casual analogies.

Modern study of the Talmud lags behind the critical study of the Old Testament. The Talmud has been one of the principal subjects of research among modern Jewish scholars. Within the last fifteen years Talmudic literature has occupied Christian scholars also. The principles of both higher and lower criticism are now being applied to it. Of the numerous scientific monographs on special subjects in the Talmud, not a few are concerned with its purely legal elements. The scientific study of Talmudic law was first introduced by Z. Frankel (1846).[1] Since then a considerable literature on the subject has grown up. Most

[1] One earlier isolated case should be noted, however. Edward Gans' *Erbrecht* contains a chapter entitled *Die Grundzüge des mosaisch-talmudischen Erbrechts,* first published in the *Zeitschrift für die Wissenschaft des Judenthums,* Berlin, 1823.

of it, to be sure, consists of monographs on special laws; while the few works that treat of the general subject are not so much concerned with the system of Talmudic law as with the provisions of this law. Post-Talmudic or latter rabbinic law, it should be noted, is a rather neglected field. Only a beginning is here discernible. But neither Talmudic nor post-Talmudic law has exercised the minds of legal students to any appreciable degree.

Comparative jurisprudence, excepting in occasional references pointing out analogies in forms and provisions, has taken no account of Talmudic law. J. Kohler, the well-known German jurist, may perhaps be regarded as the pioneer in this field also. On the basis of Goldschmidt's German translation of the Babylonian Talmud (in progress), Kohler published a study entitled *Darstellung des talmudischen Rechtes* (1907). This work, however, does not comprise the whole of the legal portion of the Talmud proper; nor does it take account of such preëminently Halakhic works as the Ṣiphre, *etc.* It is to Kohlers's credit, though, that he is the first jurist who is not at all a Talmudist to have won Talmudic law for scientific study. He "rationalized" and systematized a good part of it, and he did it with a thoroughness of scientific method that does not leave much to be desired. A scientific method, however, does not of itself produce a science. Besides, his study is one in comparative law rather than in comparative jurisprudence.

To recapitulate: of scientific studies of the whole of Jewish law (Biblical, Talmudic and post-Talmudic) there are none—always excepting the necessarily eclectic articles in cyclopedias; of monographs there are a considerable number: good, bad and indifferent, adding stone after stone to the edifice; while a survey of the whole field in the light of comparative jurisprudence seems never to have been attempted. Dr. Isaacs is thus the first in the field.

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The present study, written with a deeper knowledge of jurisprudence than Talmudists can claim and a larger knowledge of Jewish history and literature than jurists generally possess, dis-

cerns the consecutive stages in Jewish "Law." The road pointed out by Maine, Dr. Isaacs is the first to travel in the field of Jewish legal history.[2] By bringing to bear the progressive character of modern jurisprudence on Israel's experience under the "Law," we gain the fruitful conception that the law-cycles are recurrent, that they are universal—and not limited to the "Aryan race," as ethnic prejudice would assert. Our author, it should be remarked, does not think of the cycles as stratified layers, nor of their recurrence as a kind of Pythagorean Apokatastasis or Nietzschean *ewige Wiederkunft.* The recurrent cycles do present an upward development: recurrent, they start from the comparatively higher order which has previously been attained.

Law changes as language changes—perhaps *because* language changes. Laws are words; words are laws. In the beginning there were customs, conventions—words. They became laws. We have codification. Codification is law (or language) stereotyped, rigid, fixed, dogmatic—prosaic. The experience reflected in the code is of the past; and life brings new experiences. The words acquire new meanings or shades of meanings in different generations; among different individuals of the same generation. "What do they mean?" becomes the vexing question. Glossation inevitably follows. The scribes, the learned, the lawyers, or the judges are to discern their "true" meaning by a logical process of reasoning. Alas! reason soon becomes pseudo-logical syllogism and sinks into mere playing with words —with words or laws dead or dying; with words without con-

[2] While seeing this article through the press, we have come upon the footprints of a predecessor, at least along the beginning of the road. The *Jewish Review* (London, 1914, Vol. 4) contains an interesting article on *Legal Devices* by Bertram B. Benas, in which the second chapter of *Ancient Law* is quoted along with Blackstone and Dicey mainly in an effort to justify the legal evasions of the law as "fictions." In commenting on the characteristics in legal history pointed out by Maine, the author remarks that "many of them are capable of almost complete illustration by Jewish legal history." Mr. Benas, however, seeks illustrations for only two: the resort to fictions and growth by *responsa prudentium.* Without Dr. Isaacs' theory of recurrent cycles it would be difficult to apply Maine's principal observation, the sequence of the instrumentalities, to Jewish law. And Mr. Benas, indeed, feels called upon to explain why legislation seems to appear in the wrong place: the Jews, he says, have no legislation in Maine's sense! The article, though apologetic in its purpose, is well worth reading, as is its companion-piece by Rev. Isaiah Raffalovich.

tent or meaning. Endowed with "a large and liberal discontent," man soon speaks of "legalism," and yearns for a live message. Commentation sets in. The word or the law now becomes suggestive, anti-intellectual, creative—poetical. Man rejoices in anticipation of an endless "creative evolution." His imagination is stirred—only too soon to find that it is degenerating into wild fantasy. "True," he says, "the Universe is strange and deep and mysterious; but reason, too, is godly and something worth while." *Vernunft fängt wieder an zu sprechen.* . . . Life must be made orderly. He craves for reason, for order, for fixity, for—legislation. Legislation tends to become codification. And the law-cycle begins anew. Law, like every other natural phenomenon, we are taught, is subject to the "law of change."

Original in content, Dr. Isaacs' study is not less so in outlook. It establishes points of contact with present-day currents of thought. It breaks new ground. Thus, among numerous other things, it is implied that there was considerable likeness between the development of rabbinic and Christian thought. In consequence, polemics against "The Law" will now look more ridiculous than ever. For, if the "hedge" of the rabbis was at one time "legalism"—glossation—an outward form of law and precept, it was such at one stage in the cycle; it became commentation (equity) in the next. "The Law," then, taken together, presents a consistent, logical or, if you please, legal and equitable endeavor to work out a complete guide to the living of a perfect life. Further: the history of the oral tradition is beset with difficulties to both the traditionalist and reformer. All kinds of theories have been tried in the balance: those of Frankel, Hoffman, Weiss, Halévy and Professor G. Deutsch; and all were recently found wanting by Professor J. Z. Lauterbach. Related problems are the feud between the Sadducees and the Pharisees, the dissension of the Judaeo-Christians, the Karaite schism, *etc.* Again, scholars are puzzled to find anti-Pharisaic or anti-traditional laws in the works of Philo, of whose piety and earnestness there can be no doubt, and in those of Josephus, an avowed Pharisee. President K. Kohler, in an essay just published, dis-

cerns in the Halakhah "a middle stage between Sadduceeism and Pharisaism." To the students of these historical problems Dr. Isaacs' principle holds out a light. Not that it attempts to solve all the problems. But in the new light of his observations the one current theory may perhaps be verified, the other modified and the problems formulated anew. It is also highly interesting to view more recent Jewish movements under the strong search-light thrown by this study in comparative jurisprudence.

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However, the study can safely be left to speak for itself. Dr. Isaacs has earned the thanks of students belonging to different schools. He neither reverts to the traditional view, nor accepts unreservedly that of the critics, nor attempts a compromise between the traditional and the critical schools. Differences of opinion as to minor details are, of course, inevitable; but since our author does not press unimportant points, they may well be overlooked. They do not in the least affect the general course of the argument. It is, indeed, a delightful spectacle to view Jewish law as a whole, and as a connected whole; to see its "reason," its unity, its soul. Truly, here we behold a "government of laws, not of men."

Adolph S. Oko.

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"THE LAW" AND THE LAW OF CHANGE.

A Tentative Study in Comparative Jurisprudence.

The Cycles of Legal History.

"A general proposition of some value," says Sir Henry Maine, "may be advanced with respect to the agencies by which law is brought into harmony with society. These instrumentalities seem to me to be three in number, legal fictions, equity and legislation. Their historical order is that in which I have placed them. Sometimes two of them will be seen operating together and there are legal systems which have escaped the influence of one or other of them. But I know of no instance in which the order of their appearance has been changed or inverted." [1]

In explaining these terms, Maine draws occasional illustrations from English legal history which had not been worked out in his day and frequent illustrations from Roman law between the two codes—the Twelve Tables and the Code of Justinian. Of his use of Roman law he says:

> "Much of the inquiry attempted could not have been prosecuted with the slightest hope of a useful result if there had not existed a body of law like that of the Romans bearing in its earlier portions the traces of the most remote antiquity and supplying from its later rules the staple of the civil institutions by which modern society is even now controlled."

It is submitted that the history of Jewish law furnishes another example that could have been used, one with a longer continuous development than even that of the Roman law—so much longer that by its study we are enabled to assign to Maine's three agencies their proper positions as mere arcs in a cycle, a constantly recurring cycle—of which Maine says nothing. In fact, his explanations suggest that a society that has passed from the stage of custom into that of law uses one instrumentality until the next comes into being; that when the cruder instrumentality finally gives place to the more perfect one, the functions of the cruder have been exhausted for that society. The same general

[1] Maine, *Ancient Law*, Chap. 2.

observation is true of the several modifications of Maine's theory that have appeared from time to time; I shall refer in passing to two of them. Jenks would trace at least all Germanic systems from caste to contract through certain progressive stages. Dean Roscoe Pound, again, speaks of the stage of primitive law as followed by strict law, equity, maturity of law and some fifth stage upon which Europe and America are now simultaneously entering. A closer inspection of Pound's stages will reveal that they represent swings of the pendulum back and forth between strict law and equity.[2] It is submitted, however, that the periods of strict law and equity are composite and that the same component parts are discernible in each recurrence, that a self-repeating cycle is the result, and that Sir Henry Maine's observation has happily hit upon the main features of this cycle.

We need only write both at the beginning and at the end of his list "codification"—by which we understand a crystallization of law into hard and fast rules definitely stated, to make the self-repeating cycle: codification, fictions, equity, legislation, codification, fictions, equity, legislation, and so on.[3]

This cycle, subject to a few explanations which follow, it seems, fairly represents the characteristic trends in all legal histories that have so far been explored and mapped out for us.

A code is given to a people or made by them—it makes little difference. They begin by studying the text, and no expansion is possible at first unless consistent with the text. At least new ideas must square outwardly with the words of the text. If they cannot be squared in fact they can perhaps by resort to fictions. The word "fictions" here even in the comprehensive sense in which Maine uses it is too narrow. To him the expression "legal fiction" signifies "any assumption which conceals or affects to

[2] I have before me the recent restatement of his theory in The American Bar Association Journal, Vol. 3, pp. 58-64, January, 1917.

[3] No account is given here of the stage known as primitive law. Its characteristics are discussed by the writers mentioned above and by many others. Whatever may be true of it I do not admit that it is the only stage in which religion and law are united. Jewish, Mohammedan and Hindu law have never been divorced from religion, and even modern European law has become isolated from religion only gradually and incompletely. One would hardly call English law primitive up to 1857.

conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified." And this kind of fiction he connects with primitive society and its superstitions. The making of legal fictions, however, is but one manifestation of what I may call literalism. It is the attempt to do the most with the words before you. It is not so much the child of the perversity of the legal mind or the superstition of primitive man as the outgrowth of practical needs that may show themselves in a very concrete way in a highly civilized society as well as in a primitive community. Bound by a code, lawyers become word-students whose work is marked by the elevation of the letter above the spirit, a regard for the jots and tittles of the law, a point of view that we may call "glossatorial." To make the words fit life they may be interpreted artificially as meaning something that they obviously did not mean originally. Again, undue weight may be given to a peculiar turn of a phrase which may have acquired a new meaning in the course of time, and finally resort may be had to methods of doing things technically, though not actually, in order to satisfy the law. Let us call the period of fictions then the period of literalism or the period of the glossators, or word-students.

Long before this period ends, if it ever does end, the second and third points of view may appear—in fact, schools may exist side by side and quarrel for many generations over the relative merits of literalism and equity, but finally we see equity prevailing and a second period in the modification of laws is ushered in. Here, too, I wish to call attention to the fact that the designating word "equity" represents but one manifestation of a whole point of view, a point of view that historically follows the glossatorial. It is the point of view of the student whom I shall call, for want of a better word, the commentator, as distinguished from the glossator. It is a point of view that is concerned with the subject matter rather than the words, with the purposes of the law rather than its method, its spirit rather than its letter, its principles rather than its rules. It is an appeal from the text to common sense, from technical rules to fundamental principles. Maine suggests that:

"The very conception of a set of principles, invested with a higher sacredness than those of the original law and demanding application independently of the consent of any external body [for such consent would constitute legislation] belongs to a much more advanced stage of thought than that to which legal fictions originally suggested themselves."

But the chasm between the two positions is bridged when we consider that the equity stage of the exaltation of general principles may come gradually through a mode of study of the older law whereby principles are first discovered in the growing mass of rules. Glossation itself may be reduced to principles as a first step. More general principles will follow. They may be very indefinite—they may be summarized in such catch-words as "conscience," or in some vague yet potent theory of a word of God or a law of nature, or in a peculiar attitude that invests general practice with legal force; but when principles are discovered and stated they will, it seems, be readily exalted above the mere words, perhaps at first with the aid of such harmless fictions as the omniprescience of the law-makers. The desire to breathe the freer air of general principles comes to all peoples who have suffered from the choking atmosphere of too many particular rules. That desire is natural. The mode in which it is satisfied and the extent to which it can be satisfied are of course largely accidental, and will differ in different times and places. So far as the growth comes through the administration of courts, it is proper to call this period of growth the period of equity. So far as it comes through the work of students and writers, we may call it the period of the commentators, or principle-students.

The possibilities of growth by glossation and commentation, by fiction and equity, are exceedingly great—far greater than the layman would suppose—but there is a limit to what can be done with an old code. When the breaking point is reached, additions and modifications are generally made by legislation. Here again I must warn against too narrow a use of the word. The kind of change that we are now considering is not necessarily connected with a legislature. It may be conscious or unconscious. Maine suggests that legislation necessarily derives its authority from an external body or person. But I prefer to use the term with especial reference to the fact that in this kind

of law obligatory force is independent of general principles. It may be judicial legislation parading under a thin disguise. It may simply be the tacit recognition of new customs. The point is, it is the enforcement of rules alongside of the old code without the pretense that they are to be found in the old code. And when a code becomes overburdened with new matter of this kind, what is more natural than the adoption of a new code?

We must distinguish here between a code and practice books such as the abridgement (a selection) which is apt to appear in a glossatorial period, the *summa* (a summary) which is apt to appear before, and the digest (an analytical compilation) of decisions which is apt to appear after a commentatorial period. These may serve as preparatory works for the codifier. Indeed, the digest may be a pandect, an all-container, and eventually may become a code. But in themselves these books are not codes.[4] The distinguishing mark of the code is that a people accepts it—probably very gradually—as the correct, authoritative statement of its *corpus juris*. When this stage is reached, we are ready for another revolution of the cycle. In other words: every "Moses," every codifier, is followed by a "Joshua," a faithful disciple who departeth not out of the tabernacle, and "elders" who expound, by "prophets" who expand and by an "assembly" which makes a "hedge around the law," or some other kind of statutes and finally codifies again.[5] Or more technically the sequence may be illustrated in a table:

Codification
Glossation
(word-study and fiction)
Commentation
(principle-study and equity)
Legislation
Codification

[4] Many Jewish works of this nature are popularly called codes (*cf.* Jewish Encyclopedia, *s. v. Codification of Law*), but their failure to be generally adopted precludes them from the concept as used here. Thus Alfasi's sole object was to make an "abridgement"; that of Maimonides, the philosopher, was to "summarize"; that of Asher ben Jehiel and his son Jacob ben Asher was to "digest" the innovations of their time. See below.

Illustrations.

Before attempting to review Jewish experience under the "Law" in the light of this theory it may be well to illustrate the theory itself by the merest suggestion of its applicability to the two leading systems of law current in Europe and America today —the Roman-continental system and the Anglo-American system.

A. Roman-Continental Law.

Roman law between the Twelve Tables, its first great code, and the famous code or culmination of attempted codes that bear the name of Justinian, represents a perfect cycle, the cycle on which Maine bases his observation. This period sees the strict law and fictions of the Republic, the equity of the praetors and, finally, the legislation of the later emperors. Between Justinian at one end and the series of nineteenth-century codifications of continental Europe from the Code Napoleon to the *Bürgerliches Gesetzbuch* at the other, a second cycle is discernible. The first post-Justinian jurists were glossators—uncritical acceptors of the text till the rise of the school at Bologna; critical thereafter, but glossators nevertheless. Their work ended with the great glossator, Accursius. His followers were the commentators or Bartolists, whose chief work was to adapt the Roman law to the local and temporal conditions in which they found themselves. The sum total of several centuries of this kind of work was the making of a series of national legal systems based on custom with Roman law as the mere background, first as Roman law, then as natural law. At least we can approach the meeting point of Roman law and the *Leges Barbarorum* from this angle without riding "an academic theory to death."[6] There comes a time in

[5] *Cf.* the opening sentence of the Mishnah Tractate, *'Ābhōth:* "Moses received the Torah on Sinai, and handed it down to Joshua; Joshua to the Elders; the Elders to the Prophets; and the Prophets handed it down to the men of the Great Assembly. They said: '. . . Make a hedge around the Torah.'"

[6] The other approach, through the "Barbarian Laws," is in current German writings the more popular. It is reflected in England in Jenks, *Law and Politics in the Middle Ages.*

each country when the national element speaks through legislation and finally comes codification hastened in some countries by Napoleon, retarded in Germany by Savigny and his school. Modern continental lawyers with their codes in their hands are essentially glossators.

B. Anglo-American Law.

The history of Anglo-American law is parallel.[7] Two cycles are discernible with the year 1290 in the reign of Edward I, the English Justinian, as the turning point. The code or crystallization was the series of writs into which one's case had to fit or perish. The last futile efforts to extend the list had been made in the early years of Edward's reign through a series of famous statutes. For one hundred years before Edward's day the method of making the law grow was by deliberately making new writs for new cases on the basis of a general principle: no wrong without a remedy. We may call this without undue violence a period of growth by equity.[8] Still earlier and back to the Norman Conquest in spite of a strong pretense of the Norman kings to give back the laws of Edward the Confessor, that is the Anglo-Saxon crystallized customs, there were constantly being introduced reforms on the basis of fictions—especially the fiction that the king's peace was invaded in all cases of interference with possession. Since 1290 a shower of handbooks of the law, and the early Year Books show the lawyers grappling with word-problems in the writs and using fictions to make the law applicable. *"Damnum absque injuria"* delights the technical judges of the Year Books. Soon equity came on the scene. Passing by its early beginnings in the fourteenth and fifteenth centuries we find it the

[7] The cycles in Anglo-American law are fully worked out in the Introduction to the author's forthcoming book of Select Cases and Documents Illustrative of Anglo-American Legal History.

[8] Jenks has noticed the puzzling fact—puzzling unless two cycles are recognized in English legal history—that "there is, in fact, a greater resemblance between the register of writs and the praetor's edict, with its list of formulae, than between the edict and the vague processes of the early days of equity." 30 Harv. L. Rev. 16 (Nov. 1916). In view of this very just observation, I regret that I am unable to follow Dean Pound in his description of the whole period between the Norman Conquest and the equity of the chancellors as a period of "strict law."

chief instrumentality in the development of the administration of justice in the 1500's and 1600's. The 1700's show it in the process of hardening and in 1801, when Eldon comes into power, it is so well defined that it has ceased to be useful as a means of making new law. The 1800's witness the application of the third instrumentality, legislation. We have been deluged with it in England and America and today we are seeking refuge in codification. Many parts of our law are already codified. What becomes of these codes? Will a new cycle begin? Perhaps the best answer may be had by reference to a branch of law that was the first to be codified in America—antedating the period of general codification for peculiar political reasons by a century or more. I refer to constitutional law. The great constitutional decisions of the last century are largely glossatorial. What is interstate commerce? What is a jury? What is the true meaning and extent of the doctrine of *habeas corpus?* What is a postal road? What is due process of law? What is meant by the impairment of the obligations of contracts? What is an *ex post facto* law? What are the privileges and immunities of citizens? The difficulties incident to the amendment of the constitution have even driven us in recent times to the making of some new fictions. One of the boldest fictions ever perpetrated was made in 1844.[9] It is the wholly gratuitous presumption that all of the members of a corporation are citizens of the state in which the corporation was organized, invented solely to bring certain cases within the constitutional phrase, "between citizens of different states." Has not the whole college of presidential electors become a mere fiction? In addition, the constitution has been submitted to stretching by the giving of a very liberal meaning to certain limited terms—another variation of the use of fiction. Thus in time it became inevitable that Congress should have some control over trusts, over telegraphs, over white slavery, whether commercialized or not; over food and drugs, over meat inspection, over the length of working days and innumerable other subjects and all of these powers have been assumed and justified

[9] See Louisville, *etc.*, R. Co. v. Letson (1844), 2 How. (U. S.) 497; 11 L. Ed. 353; *cf.* Harlan, J., in Blake v. McClung (1898), 172 U. S. 239, 259.

by a single clause: "The Congress shall have power . . . to regulate commerce . . . among the several states." [10]

I shall digress a moment to draw a further illustration from the interpretation of the Constitution of the United States. It will serve as a close-up picture of the first stages in the post-morten history of a code. First it will suggest the necessary incompleteness of all codes even at the time of their writing, and the manner of filling them out by drawing from "common law." It was far from the minds of the draughtsmen of the constitution to enact unwritten English law into the United States Constitution. Indeed, Jefferson, who was of one spirit with many of them, advocated an act forbidding the citation of English cases. At least two of the United States passed such acts. Nevertheless, when courts were confronted with such questions as: what is *habeas corpus,* what is a jury and so on, what could they do? They had to fall back upon English decisions antedating the constitution—in other words, they had to read the common law into the constitution. And this was right—for what else could have been meant by such words, if not what the English law had defined them to be? If you adopt the language of a country, you tacitly adopt its law. A study of the part that language plays in the psychosis of a people would take me too far afield. I shall only call attention to a few coincidences. If you draw a language map of the world you have a law map. The countries speaking English—America, Canada, South Africa and Australia—have essentially English law. The part of Canada where the French language is just dying out is witnessing the simultaneous demise of French law. The countries of South America that speak Spanish are governed by Spanish codes. The countries that speak languages based on the Latin have laws based on the Roman code. In mediaeval France the line that divided the land where *"oc"* meant "yes" from the land where *"oui"* [oil] meant "yes" also separated the country of the written law from the country of the oral custumals. Lastly, the Pilgrim Fathers wanted to adopt the law of God from the Bible, but before they knew it they had imported with such words as

[10] Article I, Sec. 8.

sheriff, will, heir, chattels, county and a thousand others—the English institutions that they had meant to avoid. The relation between language and law is deep-rooted and wonderfully subtile. But to return to our subject—to interpret a code written in any language one must know the common law of the land whence the language came. Reverting to our study of the periods in the vicissitudes of a code, I may add that this common law is more important in a glossatorial period than in a commentatorial or equity period, and that it gradually loses its force in a statutory period.

Jewish Law.

We are now ready to apply these principles to Jewish law.[11] The first cycle, that which led to the completion of the Old Testament of the Bible, is not easy to approach. If modern scholarship has removed the warning, "The place whereon thou standest is holy ground," it has at the same time substituted another, "Danger Zone." [12] Without attempting to date any "documents,"

[11] In the transliterating of Hebrew the scheme used here is that which I employ throughout the new International Standard Bible Encyclopedia. I am also using the abbreviations of book names found in that work.

[12] It seems to me that Maine stopped short of using the Bible for illustrative purposes because of the first of these warnings. Mr. Oko, however. to whom I wish to acknowledge my deep indebtedness for innumerable suggestions, is inclined to suspect him of having feared the second.

[That Maine in his *Ancient Law* should not have drawn illustrations for his principle of legal development also from Biblical legislation, is more than passing strange. That he had more than a "bowing" acquaintance with Biblical law may be inferred from his discussion of the primitive operation of Wills (*Ancient Law,* 5th Ed., p. 197), and of the modern history of crimes (*Ibid.,* p. 397). J. D. Michaelis' *Mosaisches Recht* (1770-75), a work not devoid of merit, was accessible to Maine in an English translation under the title *Commentaries on the Laws of Moses* (4 Vols.; London, 1814), a title, as the translator, Rev. A. Smith, explains, suggested by the analogy of this work to that of Blackstone. It should also be noted that a decisive inroad of German theological scholarship into England had already been made three decades before *Ancient Law* was first published (1861): Milman's *History of the Jews* appeared anonymously in 1829. The liberal dean insisted that the Bible should be studied like any other historical book. Further, the text of the Old Testament was much studied in England towards the middle of the nineteenth century—witness the remarkable volume of *Essays and Reviews* (1860), the work of Bishop Colenso on the Pentateuch, and that of Dean Stanley. The trend of the times is likewise reflected in the appearance (1862) of the anonymous translation of Spinoza's *Tractatus Theologico-Politicus* by the London physician Robert Willis—a work, in which the composite nature of the Pentateuch was pointed out for the first time and in which several results of modern Old Testament scholarship were anticipated It is quite possible that Maine simply refrained from using freely the Biblical knowledge of his day for secular learning for fear of being dragged into con-

without participating in the controversies that are still the battle-ground of specialists, one may venture to survey the general legal tendencies of Old Testament times. For after all the Biblical codes, whenever and by whomever they were reduced to writing, are legal codes, subject in the hands of men to the ordinary vicissitudes of codes—a fact too generally overlooked by radical and conservative alike. We must remember that as codes they are incomplete statements of the law of a people, and that they are, like the Constitution of the United States, based on a common law, that they call for interpretation, and that through interpretation they grow.[13]

Biblical common law—the common law of the Hebrews—may need a little elucidation. Let us take a few examples. In the first place Biblical law provides for a refuge from the avenger of blood.[14] Where does it tell what an avenger of blood is? Nowhere. Everybody is presumed to know that part of the common law—and it is not repealed, only mitigated. Again, no mention is made in Biblical law of the rights of sons to inherit, but assuming that everybody knows that principle, the Biblical language [15] becomes clear. It provides rules of inheritance in case a man die and have no son. More particularly the peculiar rules of primogeniture of the Hebrews—the giving of a double portion to the first-born—are nowhere laid down; they are pre-

troversy. We must remember that from 1860 to 1864 English academical and clerical obscurantism was much agitated by the publication of *Essays and Reviews*, by the Colenso "heresy," and finally by the tremendous interest aroused by Darwin's *Origin of Species* (1859). "Maine," Sir Frederick Pollock tells us, "was generally averse to controversy."—A. S. O.]

[13] Since writing this paper I have been interested to learn that the "consuetudinary" laws presupposed in Biblical legislation were recognized by Michaelis one hundred fifty years ago. (*Commentaries on the Laws of Moses*, Book I, Art. III.) Michaelis uses two of the illustrations above and adds that of divorce, which is checked, though nowhere specifically authorized. Its authorization is in the common law. (Dt. 22 19, 29; 24 1-4, AV and RV are here misled by the paraphrase in Mt. 6 31, and Michaelis is right, *cf.* Jew. Pub. Soc. translation; Jer. 3 1.) Michaelis fails to see in Jewish tradition an outgrowth of this "consuetudinary" law. Consequently some of the conclusions he draws from his find differ radically from the present author's. Michaelis' readiness to draw upon popular accounts of contemporary Arabic culture for illustrations of the Bible contrasts strangely with his utter inability to see the more obvious illustrations in Jewish history.

[14] Nu. 35 9-28; Dt. 19 1-10.

[15] Nu. 27 8-11.

sumed to be known in the discussion of the illegality of the transferring of the birthright of the child of one wife to the child of another.[16] The levirate law is recited in the Biblical codes,[17] but more attention is paid to the *ḥălīçāh,* or the formula for its evasion, than to the old custom itself.[18] Now we find traces of all of these institutions and many others in the stories of the patriarchs where they have all the earmarks of common law or custom. There is the vendetta in the relations between the sons of Jacob and the men of Schechem.[19] Inheritance and primogeniture run through the stories of the patriarchs. The levirate is illustrated in the story of Judah and Tamar.[20] In short, strange as it may seem to the layman, to the jurist there is nothing remarkable in the Talmudic notion that before the days of the written law, Abraham, the Hebrew, observed the oral Torah, the common law of the Hebrews.[21] But we need not center our attention on the peculiar institutions of the Hebrews to see the significance of their common law in the interpretation of the Hebrew codes. Every Hebrew word, in even the simplest of sentences, carries with it its bit of Hebrew common law. *Baṣukkōth tēsh^{e}bhū* — in booths shall ye dwell.[22] What is a *ṣukkāh?* How high may it be and still be a *ṣukkāh?* How low? Of what materials may it be made? How may it be covered? What part of its wall space may be open without doing violence to the denotation and the connotation of the term as understood when and where the code was made?[23] The term had some connotation at the outset—in other words, there was on these points a *hălākhāh l^{e}Mōsheh miṣSīnai* or, in English, a custom from a time that the memory of man runneth not to the contrary. And the questions are legitimate, legal and logical in a

[16] Dt. 21 16, 17.
[17] Dt. 25 5, 6.
[18] Dt. 25 7-10.
[19] *Cf.* also Gen. 9 5.
[20] Gen. 23.
[21] See commentaries on Gen. 26 5, "because Abraham obeyed my voice, and kept my charge, my commandments, my statutes, and my laws."
[22] Lev. 23 42.
[23] *Cf.* Mishnah, *Sukkāh* I. 1.

glossatorial study. One source from which to draw the answers would be the opinion of persons who have retained the traditions of the language. The practical interpretations of men in different districts would also be relevant. In like manner the learning of the various kinds of labor prohibited on the Sabbath resolves itself into what is *m^{e}lā'khāh* (labor) and the *'ābhōth m^{e}lā'khāh* (principal divisions of labor) of the society in which the law was declared or in which it grew up are proper subjects for the consideration of the glossator.[24]

A. The Biblical Cycle.

Just how long the interpretation of Biblical law was *bona fide* explanation of what passages originally meant and nothing more, it is hard to say. Tradition tells us that Moses himself began the process of expounding,[25] and Joshua is supposed to have continued it as his faithful disciple.[26] I have already suggested an explanation in the light of comparative jurisprudence of Jewish tradition's famous account of itself. It is significant that from a host of possible claimants, including kings and priests, it recognizes as its true bearers only men who characterize the normal stages of legal development.

[24] The sacredness attributed to the Bible prevented Jewish law from being anything but glossatorial for a long time. Indeed the glossatorial form runs through Hebrew legal literature for many ages; thus the *halakhic Midhrashim* interpret Biblical law, the Gemara interprets the Mishnah. But if this glossatorial form reveals the beginning of Jewish legal science, even if it points out a predominant feature in it, it must not be taken as an indication that Jewish legal learning remained glossatorial in spirit through all these ages. Indeed one of the logical weaknesses of Jewish jurisprudence from a modern point of view is the very practice that gave it its strength in the past—it is the attempt to base the new code on the older ones, where the basis of the new may be independent of the terms of the old, and just as solid. Thus, "Thou shalt not seathe a kid in its mother's milk," were it repeated ten times instead of three would not suggest anything like the Jewish practice to the modern jurist. Undoubtedly the Jewish practice is based on very ancient tradition. Yet the ancient lawyer who recited that practice, when asked for an authority, did what a modern lawyer frequently has to do when he has no case on all fours with the case at bar: he cited an instance not exactly in point, but one showing a clear tendency in the same general direction. If one of his followers thereafter writes the accepted law in the form of an annotation on the old code, he leaves the impression that the practice is derived solely from the passage cited, a decidedly puzzling impression. "Queer proof assumes the guise of queer inference."

[25] Dt. 1 5, where the Hebrew *bē'ēr* means "to explain"; *cf.* Josephus, *Contra Apionem*, II. 17.

[26] Mishnah, *'Ābhōth*, I. 1; Maimonides, *Mishneh Torah*, Introduction.

It is remarkable, moreover, that the tendencies suggested are borne out by such other evidence as we have of the times covered. Thus, the pre-prophetic age cannot be dismissed as a codeless period. It is a period of literalism. Joshua and Jephthah must live up to the letters of their promises, no matter how repugnant their deeds to the spirit. Even the great Samuel does not tell us that the spirit is greater than the letter, but on the contrary: "Hath the Lord as great delight in burnt offerings and sacrifices as in obeying the voice of the Lord? Behold, to obey is better than sacrifice and to hearken than the fat of rams." [27] This archaic pronouncement might serve as the motto of a glossatorial school. In the same period fictions are already rife—for example, the fictitious or symbolic transfer or sale necessary to bind a bargain in the story of Ruth, and the fiction by which a tribe is saved from extinction.[28] In the days of the early kings, David's worst enemies cannot be dealt with by Solomon without a technical charge against them.[29] Solomon is told to act according to his wisdom in this matter, and the essence of legal *ḥokhmāh* in his day seems to be to make the words of the law do more than was originally intended. In no other sense was the famous judgment of Solomon *ḥokhmāh*.[30] The pre-prophetic period is a literalistic period; the prophetic, one of equity. "What doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?" [31] Isaiah's ideal ruler "shall not judge after the sight of his eyes, neither decide after the hearing of his ears; but with righteousness shall he judge the poor, and decide with equity for the meek of the land."[32] The spirit of the prophets is clearly a spirit which our observation of other systems would place in time after the growth of formal law, and here is a new factor with which some of the theorists on the subject will have to cope.

At the end of the prophetic period a catastrophe helped the

[27] 1 S. 15 22-24.
[28] Ruth 4 7; Jgs. 21 16-23.
[29] 1 K. 2 6, 36-46.
[30] 1 K. 3.
[31] Mic. 6 8.
[32] Isa. 11 3, 4.

transition from equity to legislation. The Exile forced the people into a conscious readjustment of their lives. And it is not surprising that at the Return a great period of legal reconstructions set in. So many statutes or *Taḳḳānōth* could be traced by tradition to Ezra and his associates [33] that anonymous statutes were in general popularly attributed to the men of this time. These were the men who said, "Make a hedge around the Torah."[34] And with Ezra the canonization of the Bible—the authoritative repository of the law—begins. We have a new codification and even while it is in progress a new period of literalism sets in.

B. The Mishnah Cycle.

The next cycle, that between the Old Testament canon and the Mishnah, is better known to us for its political and religious history than for its legal development. It is the period of the Second Temple, of the Maccabees, of the birth of Christianity, of the Wars of the Jews, of the destruction of the Temple and of the dispersion of the Jewish people. These great events did not pass without influencing the development of Jewish law, but the period furnishes a remarkable instance of how the common people's law takes its natural course in spite of catastrophes. We are told that Simeon the Righteous, the last of the Men of the Great Assembly, was followed by Antigonus of Soko and he by *Zūghōth,* "pairs," who through four generations conserved the traditions to the days of Hillel and Shammai. Four generations of Tanna'im (*tannā'īm,* "teachers," a title in this period), the schools of Hillel and Shammai, carry on the tradition until the next codification, the Mishnah. Though very little has been written of the steps by which this law grew—and for this reason I shall study the period more fully than the others—we have sufficient evidence to support the view that glossation (including fictions), commentation (including equity) and legislation, so far as it appeared, followed each other in the usual order.

[33] Ten in one place, *Bābḥā' Kammā',* 82 a.

[34] A Biblical justification for legislation was found in Dt. 17 9.

Of the first step, the verbal expounding of the Bible, we have several kinds of evidence. The reading of the Torah and the explaining of passage by passage in the synagogue is supposed to go back to Ezra.[35] This method of the study and application of the law to which the name of Midrash (*midhrash,* from *dārash,* "to expound") has been given is, according to a very old reliable tradition, to be ascribed to the pre-tannaitic period. Sherira Gaon in his famous letter on the history of tradition expressly says that the midrashic method preceded other methods of study. Traces of it are to be found in the Bible. Glossations must have become quite complicated very early indeed, for in the period of the *Zūghōth* there had already grown up opposition to it. What were the Sadducees who gave Simeon ben Shetaḥ so much trouble but Jews with Hellenistic leanings, who, though accepting the Bible, rejected the tradition that pretended to interpret every letter of it? What were the early Christians but protesters against the Scribes and Pharisees, who held to every jot and tittle of the law, who tithed mint, anise and cummin, who made fine distinctions between swearing by the temple and by the gold of the temple and against the lawyers also, who, while lading men with burdens grievous to be borne, seemed to leave the commandment of God to hold fast the traditions of the elders? [36]

Besides Sadduceeism and Christianity, there was a third form of reaction against the literalism, the glossation that marked the period of the *Zūghōth:* it was that of the main body

[35] Neh. 8 1-18.

[36] I refer here only to "the early Christians," the small community that existed as a sect among the Jews before it developed into a church. For the persistency of the trend in human nature which our cycles represent is illustrated again in the history of the canon law of the Roman Catholic Church. Between the New Testament and the closing of the *Corpus Juris Canonici* in the work of Jean Chappuis in 1500, there is discernible first the period in which the church fathers and the early councils were busy interpreting such matters as the effect of such texts as Acts 11 and 15 on the law, or the proper date for Easter or day for the Sabbath, a glossatorial period. Then comes a period of the growth of local customs and usages and their expression in local councils, a period in which natural and divine law or equity is perhaps the dominant guiding principle. The attempts to collect the decisions from all parts of the world and to extract general principles from them, from Dionysius Exiguus to Gratian's Concordantia Discordantium Canonum, belong here rather than under codification, and indeed they have never been recognized in the Catholic Church as codes. From Gratian to the close of the *Corpus Juris Canonici,* there are Extravagantes, the five compilations summarized by Raymond of Pennaforte for Gregory IX (1234) and the Liber

of Israel. Glossation was to be softened by fiction under the influence of Hillel and fiction was to be followed by equity in the School of Hillel.

Let us look at the most famous fiction of this period, the Prosbul (προσβολή), a fictitious assignment of a debt to the court in order to toll the bar of the Biblical statute of limitations. In the Mishnah [37] we read:

"The Prosbul . . . is one of the things that Hillel, the Elder, instituted. Seeing that the law which prescribed the release of all debts every seventh year [38] brought about the harmful consequence that people refused to loan one another and thus violated what was written in the law, namely, that a money loan should not be withheld because of the approach of the sabbatical year [39] Hillel instituted the Prosbul."

Hillel in thus making the law respond to the needs of a community that was passing from agriculture to commerce did not deviate from the letter of the law. The institution is based on a peculiar stressing of words in the Bible, "That which is *thine* with thy brother thine hand shall release."[40] The attitude of later generations to the Prosbul is suggestive: Samuel of the first generation of Babylonian Amoraim, disliked it, whereas Rabbi Nahman, of the third generation, the fiction period of the next cycle, wished to extend it.[41]

Sextus of Boniface VIII (1290), the Clementinae (1314-1317). the Extravagantes of John XXII and Extravagantes Communes. These Extravagantes which precede the final crystallization of the law correspond with what we have called legislation. Upon the code follows the period of literalism that countenanced the wholesale sale of indulgences. By a queer irony the church that had its birth in a revulsion against literalism was now faced by a kind of new Sadducees who demanded a return to the old text, freed from tradition. For them the Bible had to be translated and popularized and fifteen centuries of history forgotten. It is interesting to note, too, how Protestant theology persists in describing Catholicism as it was at the time of the schism, wholly literalistic, just as Christianity in general describes Judaism though in each counter-reformations have set in and the cycles have continued turning on their ceaseless course. "As time goes on," says Professor Auguste Boudinhon, in speaking of the interpreters of the *Corpus Juris Canonici* of this period (*s. v.* Canon Law, Enc. Brit. 11th Ed.), "the works gradually lose the character of commentaries on the text, and develop into expositions of the law as a whole." It will hardly be necessary to remind the reader that Protestantism itself has not escaped institutionalization.

[37] Mishnah, *Sheḇhī'ith*, X. 3.

[38] Dt. 15 12.

[39] Dt. 15 9-11.

[40] Dt. 15 3.

[41] *Gittīn*, 36 b. For another of Hillel's institutions showing a like tendency, *cf.* Mishnah, *'Ārākhīn*, IX, 4 on Lev. 25 30 as to the sale of houses.

A better illustration of what can be done by fictions is furnished by *'Ērūbhīn*—of several kinds, of "boundaries," of "courts," of "cookery"—all of them fictitious means. The first, that of *t^eḥūmīn* or boundaries causes a man's home to be at any spot he may designate in advance so that he may move about in a circle of two miles around this point on the Sabbath. The second, of *ḥăçērōth* or courts, makes a fictitious unit out of a group of households so as to permit transportation on the Sabbath in a place that would otherwise constitute numerous domains instead of one domain. The last, of *tabhshīlīn* or cookery, constitutes a fictitious nucleus of the Sabbath meal when a holy day falls on Friday, so as to permit cooking on the holy day for the Sabbath; for, while it is improper to prepare the Sabbath meal on the holy day, there is no objection to the making of additions to a meal already technically prepared. In addition, there is the simple *'ērūbh,* the fictitious completion of an enclosure by extending a pole or drawing a cord across the unfenced part of the boundary of a street or court in order to make an enclosure of it and make transportation on the Sabbath within it permissible. The origin of *'Ērūbhīn* is not easy to trace. I am discussing them as fictions of the pre-Mishnah cycle because they were firmly established in the Mishnah and we know that the followers of Zadok and Boethius, the Sadducees, fought against them [42] as Sabbath desecration. Later Talmudic writers, however, ascribe to them even greater antiquity, connecting the creation of these fictions with the name of King Solomon. It is not inconceivable that some parts of the fiction date back to the literalistic period that preceded the great equity prophets.[43]

I have drawn illustrations of the modification of law without deviating from the letter, from the laws of human relations (*bēn 'ādhām la-ḥăbhērō*) and also from the religious law (*bēn 'ādhām la-māḳōm*). Now I shall show how technicality was used to mitigate the criminal law. The harshness of the criminal law of the Hebrews has frequently been commented on by critics and apologists. Here, as in English law, the humanity of the judges caused them to indulge in technicalities. The Bible says:

[42] Mishnah, *'Ērūbhīn,* VI, 2.

[43] *Cf.* Isa. 1 13; Jer. 17 21-27; Ezk. 20 12-24.

"At the mouth of two witnesses or at the mouth of three witnesses shall a matter be established." [44] This condition, say the rabbis, is not fulfilled if the witnesses differ in their stories in the smallest detail. Again, take the case of the "son, stubborn and rebellious." The Bible condemned him to death. But the rabbis stretched every point in his favor. On the basis of Biblical verses they insisted upon numerous details that had nothing to do with the culpability of the rebellious son. Thus: [45]

". . . he is not declared a son stubborn and rebellious until both parents desire it. If one of them is broken-handed or lame or dumb or blind or deaf—he is not declared a son stubborn and rebellious, as it is said 'Then shall his father and his mother lay hold on him,'[46] which is impossible if they be broken-handed; 'and bring him out,' which is impossible if they be lame; 'and they shall say,' which is impossible if they be dumb; 'this, our son,' which is inapplicable if they be blind; 'he will not obey our voice,' which is inappropriate if they be deaf."

In general, capital punishment even for murder was so abhorrent to the rabbis that its infliction was to be prevented by all legal means. A court that condemned more than one man in seven years, or according to others seventy years, was deemed "murderous." And two learned teachers, Tryphon and Akiba, openly avowed that no one would ever have been condemned to death by a court had they been members.[47]

Hillel, in whom we have found the tendency to develop the law, did not stop with fictions. Though his teachers, Shemayah and Abtalion, were glossators,[48] in him was realized the true spirit of equity. There is a Talmudic story of a scoffer who asked Hillel's contemporary, Shammai, to teach him the whole Torah while standing on one foot. Shammai, the glossator, could only express his indignation. Hillel, the commentator, could easily extract the spirit from the letter and in a moment he summarized the law: "Do not do unto others what you would not have them do unto you." [49] Among the principles that this commentator developed were his seven rules for the guidance of glossators.

[44] Dt. 19 15; *cf. ib.* 17 6.
[45] Mishnah, *Sandhedrīn,* VIII, 4.
[46] Dt. 21 19, 20.
[47] Mishnah, *Makkōth,* I, 10 *et passim;* see 12 Jew. Encyc. 34 b.
[48] *"Darshānīm," Pesaḥim,* 70 b.
[49] *Shabbāth,* 31 a.

It is, of course, not easy to summarize in a single sentence all the differences between the Schools of Hillel and Shammai. The strictness of the Shammaites is generally contrasted with the leniency of the Hillelites.[50] One writer,[51] after rejecting various proposed solutions, says: "In all laws enunciated by these schools on the basis of the derashic method, the Shammaitic school leans to a more literal interpretation of the Biblical texts than does that of Hillel." In the few words of the founders of these schools that have been preserved, it is not surprising to hear Shammai urging us to "definiteness" in learning, and Hillel telling us to love people and bring them near to the Torah. And in the ultimate acceptance of the views of the school of Hillel by catholic Israel, we see the prevalence of equity over strict law.

Occasionally interpretation based pretty clearly on an observed difference between theory and practice completely reverses a Biblical text. Take the *lex talionis*. The Bible says: "Eye for eye, tooth for tooth." The Mishnah tells us that this means damages, payable in money.[52] Undoubtedly it was so interpreted, but the origin of the substitution seems to have been the influence of the judge on the plaintiff. It is equity mitigating the law.

Or take divorce. Biblical divorce law is one-sided. The Mishnah adds to the Biblical restrictions certain others and mitigates the harshness of the divorce law by throwing technicalities in the husband's way. The formalities in arranging, writing, attesting and delivering the "*get*" (bill of divorcement) are made so burdensome that rabbinic aid is absolutely needed.[53] It was made the duty of the learned man consulted to do all in his power to effect a reconciliation of the parties unless a sufficient ground for divorce were found. And though the Bible gave the husband the power to divorce his wife, and the wife no corresponding power, the Mishnah provided that in certain cases the husband could be compelled to write his wife a bill of divorcement.

It is idle to speculate as to what Jewish law would have been had Jewish national life continued uninterrupted from without.

[50] 3 Jew. Encyc. 115.
[51] Auerbach, *Obligationenrecht*, p. 72.
[52] *Cf. Bābhā' Kammā'* 84 a.
[53] *Cf. Kiddūshīn*, 6 a.

The destruction of the Temple, the removal of the Synhedrion from Jerusalem to Jabneh and the taking up of the administration of the law without a government entailed new problems, some of which were met, strange as it may seem, by legislation, by pronouncements from those men who by general consent were entitled to be heard. The chief problem, how to preserve the law, could be met in the long run only by codification. Two types of men were doing this work, types that were destined to become more clearly differentiated as time went on: the law-conservers and the law-improvers. Johanan ben Zakkai at this time called one of his students a cemented cistern that loses not a drop—and another a spring that gets stronger and stronger as it flows. The great law conservers were Simeon ben Gamaliel, who laid the foundations for further building in Palestine, and Eliezer ben Hyrcanus, who boasted that he never taught what he had not heard from his teacher. The great law improvers were Rabbi Eliezer, son of Arak; Akiba and Rabbi Meir. Rabbi Judah the Prince, combined their traits.

So long as possible, codification and ossification were delayed by the wholesome instinct of the people. The recording of *hălākhōth* was understood to be forbidden.[54] But the danger of forgetting the oral Torah seems to have overcome the prejudice and after several generations of formulation of the tradition in succinct sentences by the schools, a kind of legislation, if you please, there finally appeared the Mishnah, a redaction of several private compilations by Rabbi Judah, the Prince.

C. The Gemara Cycle.

In the four centuries that intervene between the closing of the Mishnah and the completion of the Gemara (*g^{e}mārā'*, meaning either "teaching" or "completion"), the great annotation and commentary to the Mishnah, two periods stand out: the period of Palestinian supremacy and the period of Babylonian supremacy. After the first generation of Amoraim (*'ămōrā'īm*, "dictators" the title of distinction in this period), Rab and Samuel and Hanina bar Hama—a very great glossatorial interpreter—had passed away, it seems that the two theories of juristic study that

[54] *Gittīn*, 60 b; *cf. Temūrāh*, 14 b.

had co-existed in pre-Mishnaic days were contending for the upper hand. I should call the one literalism and the other commentation; but the devotees of the two tendencies were soon nicknamed in a manner that shows that the tendencies were distinctly felt: "Sinai," the Mountain of the Torah, and "*'Oḳēr hārim,*" Uprooter of Mountains. By "Sinai" was meant the man with the power of acquiring learning from his teacher and of transmitting it. Such a man was only unconsciously or accidentally a law improver. By "mountain-uprooter" was meant the man who could do original work, whose chief business it was to improve the law. In Palestine there was a strong tendency to prefer the Sinai—perhaps because, after all, the great task that confronted its school at the outset was the collection and codification of the law and then its promulgation.

So long as the Palestinian school was supreme it was dominated by the spirit of Rabbi Simeon ben Gamaliel, who had fought valiantly for the theory that Sinai is better,[55] and his method of study stifled the casual *'oḳ^{e}rē hārīm,* the mountain uprooters. Rabbi Meir felt out of harmony with his times, and indeed he was a genius born a century too soon. Another of his contemporaries is said to have milled much grain and to have produced but little meal. In Babylon, however, the traditions had always been freer. There the teachers had no such responsibility as had been assumed in Palestine. Perhaps the reforming tendencies of Hillel are not unconnected with his Babylonian education.[56] At any rate, in the times of which we are now speaking the differences between the Babylonian and Palestinian schools had become remarkable. An instance or two will serve as proof. Zeera, in the third generation of Gemara scholars, as the story goes, on deciding to leave Babylon for Palestine, had to evade his teacher (Rabbi Judah ben Ezekiel, the Sharp-witted), and before starting determined to spend a hundred days in fasting in order to forget the dialectic method of instruction

[55] *Hōrāyōth,* 14 a.

[56] An interesting story in this connection is recorded in the Palestinian Talmud, *Peṣāḥīm,* Chap VI. Hillel, some time after his arrival in Palestine was asked a question. He gave a clear answer and argued all day to prove his point, but he was laughed at. Finally, in despair, he cited his teachers as authorities for his position. Thereupon, according to the rather sudden statement of the narrator, they made him president of the Synhedrion.

of the Babylonian schools, that this might not handicap him in Palestine.[57] In the same generation (in the early 300's), we are told,[58] a vacancy occurred at the head of the Babylonian school of Pumpadita—Pumpadita, where they try to pass the elephant through the needle's eye in their dialectics. Two candidates were being considered—Rabbah bar Nahmani, greatest of the Mountain Uprooters,[59] and Rabh Joseph bar Hiyya, a Sinai. Messengers were sent to Palestine to ask which the Palestinians recommended. Of course, they preferred the Sinai—but out of deference to Babylonian tendencies, no doubt, he retired in favor of the *'Oḳēr Hārīm*. From this time on we see the Babylonian school wresting the supremacy from the Palestinians. Auerbach, remarking on this strange phenomenon, shows[60] that we know of no political or other external conditions capable of explaining the downfall of the Palestinian school, and concludes: The one inherent cause was the faulty method that had been prescribed for the study of the law in Palestine for all time to come by Rabbi Simeon ben Gamaliel. In other words, the Sinai now gives way to the mountain uprooter, the word student to the student of underlying principles; glossators are followed by commentators.

The next generation, that of Abaye and Raba bar Joseph, is the greatest creative period of the Gemara in Babylon—whereas in Palestine the Gemara is beginning to close its career. It is a period of growth by analogy, a period of formulation of principles, a period in which not the words of the Mishnah, but only the contents are accredited with legal force—in a word, a period of equity. The dissertations of Abaye and Raba bar Joseph led to many new decisions and rulings. With the exceptions of Rab and Samuel, we have more disputations of these teachers and of their immediate predecessors, Rabbah and Rab Joseph, than of any other pairs. Theirs is the greatest period in the development of the civil law. It would be interesting to examine their additions to the body of the law, but this study would take us too far

[57] *Bāhbā' Meṣī'ā'*, 85 a.
[58] At the end of *Hōrāyōth*.
[59] *Berākhōth*, 64 a.
[60] P. 102.

afield. A cursory examination suggests that the period witnesses a progress from status to contract.[61] Thus bailees are classified in accordance with the peculiar circumstances of the bailment to a greater degree than had been done in the Mishnah.[62] In fact, sub-classification on the basis of peculiar circumstances and implied conditions may in general be considered the method of the Babylonian schools at the height of their creative work.

After a generation or two of this work, the bulk of the law becomes too great for human memory to carry—and then Rabbi Ashi (372-427) begins to reduce it to writing. His task is carried on by Rabina (d. 500) and finally closed within another century by men who are no longer "dictators," but mere "suggesters (*ṣabhōrā'īm*). Their work, the Gemara, was not a code either in form or in its object. It was rather a digest of what had gone before. It has generally been recognized in Jewry that decisions cannot be based on the Gemara alone. It is full of the material out of which laws can be formulated, but it stops short of formulation. And yet it was a great step in the direction of codification. By the adoption of certain rules as to whose view shall govern in each class of cases, for practical purposes a digest can be made to do the work of a code—and such principles were adopted by the successors of the "suggesters," the "excellencies" or the Geonim (*g^{e}'ōnīm*, plural *of gā'ōn*).[63] The geonim did not hesitate to add to the substance of the law by a quasi-statutory method. To make fictions on top of the Talmudic fictions would surely have been "to eat bread with bread." Consequently where changes were demanding attention in this epoch legislation was needed and used. *Taḳḳānōth* and *g^{e}zērōth* and *ḥērems*—in a word, statutes, were promulgated in these times. The best known, though perhaps not the best authenticated, were those

[61] Is not this kind of progress a mark of commentatorial periods rather than a continuous factor in the history of law? *Cf.* Pollock's Note L, to chapter 5 of Maine's *Ancient Law*, where reference is made to "the reaction against this doctrine which we are now witnessing." The phrase "any provision in any contract to the contrary notwithstanding" is becoming quite

[62] *Bāhbā' Me^{e}çī'ā'*, 94 b; *Bāhbā' Kammā'*, 56 b.

[63] In adopting these rules they followed the precedent of the Gemara itself in dealing with undecided disputes in the Mishnah.

popularly attributed to one who was not himself a gaon, Rabbenu Gershom, about the year 1000, prohibiting polygamy and regulating divorce. But under the Geonim gradually, almost imperceptibly, the feeling spread among the Jews of the world that their law was completed, crystallized, or, in the word that I have here adopted, codified.

D. The Post-Talmudic Cycle.

The Geonim were to the Talmud what the Scribes had been to the Bible. They closed it. They legislated or made a hedge around it. They made it a code for the people and closed a cycle in the evolution of Jewish law—but they also began a new cycle by their undertaking of the work of interpreting the Talmud. They were near in time and in spirit to the last of the makers of the Talmud. They spoke the same language, lived in the same country, taught in the same schools. Consequently who could speak with greater authority than they on doubtful questions as to the meaning of the latest codification? Several of the Geonim devoted their attention to the exposition of special parts of the law. One, Zemah ben Paltoi (*ca.* 872) composed a lexicon. Sherira Gaon, whose letter on Jewish tradition we have already mentioned, wrote annotations to explain many difficult terms. Other manifestations of a period of strict law are also apparent. There is even a revolt against the entire traditional law. It is that of the Karaites, bearing a marked resemblance to the reaction of the Sadducees of the next preceding glossatorial period.[64] The typical handbook for such a period, the "abridgement," appears in Alfasi's work (1013-1103), popularly called the Little Talmud.[65] The approach of a period of principle study is foreshadowed by the appearance of a *summa,* the famous Mishneh Torah of Maimonides. This great philosopher, though seeking princi-

[64] Another type of reaction that frequently follows glossation, is mysticism. Corresponding to the Essenes and Judeo-Christians of an ealier day and the Ḥasidim of later times, we find the Kabbalists developing their theories at the close of the Gaonic period.

[65] The *Hălākhōth Gᵉdhōlōth* of this period were the results of an attempt to rearrange the material in the Talmud for practical purposes.

ples, was not far from the glossator in spirit, nor above the making of fictions. Thus he says: There are things resembling usury that are allowed, *e. g.,* a man may buy at a discount bonds belonging to his neighbor; a man may give his neighbor a denarius, on condition that he lends 100 denarii to a third person; A may give B a denarius to induce C to lend him (A) 100 denarii.[66] This is hardly the spirit of those commentators from whom he had learned to condemn, though not always to prohibit, the "dust of usury" and the "appearance of usury." [67]

All the purely glossatorial work of this period was summarized and superseded by that of Rashi. Rashi (1040-1105) is the Accursius of the Jews—his is the last word on the possibility of the method of the glossators—but his grasp of all parts of the Torah at once is so great that he rises to the height of a commentator in spite of his purely glossatorial form. He is immediately followed by a school of men whom we may well call commentators in the technical sense.

The Tosaphists of the twelfth and thirteenth centuries have been compared to the writers of Dissensiones to the Roman code during the first quarter of the twelfth century.[68] The very word *Tōṣāphōth* (though its particular application is doubtful) suggests additions rather than mere explanations. The method of the Tosaphists is to select points and deal with all of their ramifications in little essays, rather than to give a continuous explanation of the legal text before them. Rashi's own son-in-law and grandsons were the first of the Tosaphists.[69]

It is a mistake to suppose that the work of the glossators and commentators was purely academic. Jewish law was constantly being applied to life—and still is—and being developed by *pōṣ^{e}ḳim,* whose decisions and responses have added a great deal to the bulk of the law. Of course, they adhered as closely as possible to the letter of the transmitted law—but as time went

[66] *Mishnah Torah,* Book XIII, *Malweh,* Chap. V, Sec. 14.
[67] *Ib.* Sec. 15.
[68] 12 Jew. Encyc., p. 202.
[69] In the printed editions of the Babylonian Talmud Rashi and the Tōṣāphōth are arranged as a framework around the text of each page.

on and the occupations, locations and conditions of the bulk of the Jews were completely changed, they had to use a good deal of common sense in drawing analogies from the received law. Where judges are forced to use their common sense in this way equity flourishes. The fact that Jews were living under widely different conditions in different countries led to the development of local *minhāghīm* (customs),[70] just as national elements were to be mingled with the catholic elements of Roman law in the period that I have called an equity period. It was only a question of time till dissatisfaction would arise in some systematic minds over the indefiniteness of this condition. Indeed, quite within the days of the Tosaphists were heard rumblings of the discontent. Perhaps for the embodiment of this we should look to Asher ben Yehiel, and to his son Jacob. Jacob ben Asher (d. 1340) drew the plans and laid the foundation for the next code—but his works, the *Ṭūrīm,* are not the great code, they are only a digest—a digest, it is true, which takes cognizance of much new matter—but not all of it by any means, for new matter was being rapidly produced even while Jacob was compiling what he had before him. In course of time this new matter led to the making of a digest that was to become a code—the *Shulḥān ʿArūkḥ* (Prepared Table). In one sense this famous work of Karo (1488-1575) is nothing but a revision of the *Ṭūrīm.* But in another sense it is a code in which the lacunae of the older digest are filled in by a peculiar substitute for legislation,[71] a substitute that had been twice resorted to in the history of Roman law—the counting of hands among highly respected writers of the past. Karo gives a vote each to Maimonides, Alfasi and Jacob ben Asher on all doubtful matters and objectively records the results. It is significant that even this objective method did not please the German and Polish Jews. It failed to take cognizance of the

[70] It is of course beyond the scope of the present study to investigate the sources of particular legal ideas, for example suggestions borrowed from other systems of law. It is hoped, however, that an understanding of the inner continuity of Jewish law will be helpful in the study of external influences.

[71] For true legislation in the period see article on Takkanah, in 11 Jew. Encyc., p. 669.

customs, the decisions and the writings that had become a part of their law. So Rabbi Moses Isserles, a younger contemporary of Karo, proceeded to revise his work for the benefit of the northern Jews. He modestly characterized his contribution as a cloth for the table that Karo had prepared. But this table covered with the cloth—perhaps concealed by it—soon was recognized by catholic Israel as its code.

E. The Present Cycle.

The definiteness which now marked the law of the Jews once more turned the attention of its practitioners and teachers to glossation. Not only were three great annotations produced within a century, those popularly known as the Bah,[72] the Ṭaz,[73] and the Shakh,[74] but also the whole spirit of Jewish scholarship became the technical spirit of glossation. The tool that scholars were to use for nearly three centuries was by a strange coincidence fashioned almost simultaneously with the *Shulḥān 'Arūkh* itself. I refer to the pilpul. Rabbi Jacob Pollak (d. 1541) and particularly his pupil, Shalom Shakna ben Joseph (1510-1558), father-in-law and teacher of Rabbi Moses Isserles (1520-1572), are credited with the invention of the hair-splitting methods of the modern *pilpul*. The word, which means "pepper," might suggest a sharpening of wits of the kind that we have found among the mountain-uprooters of old, who were also pilpulists in their way. But unfortunately these modern pilpulists did not address themselves to big principles. They did work out a few petty fictions to adapt the law to their life, notably the fictitious sale of unleavened bread on the Passover and the fiction by which a rabbi can be paid. Legally a rabbi should receive no pay for his services, but by the fiction he has some other means of support and is supposed to be paid for time taken from his regular

[72] *Bayith Ḥādhāsh*, 1640.

[73] *Ṭūrē Zāhābh*, 1646.

[74] *Siphᵉthē Kōhēn*, 1646. Two abridgements have in the last century achieved as wide circulation, those of Abraham Danżig and of Solomon Ganzfried. The work of the former is almost a *summa;* that of the latter rather a text-book.

work for the needs of the community. But in general the teachings of the pilpulists—we can still hear echoes of them—were clever, wonderfully clever, disputations, rich in words, woefully poor in principles. Clever for cleverness' sake. Whatever good there had been in the method in the beginning, it had long been over-ripe and rotten in the eighteenth century, when newer growths began to crowd for its place.

The reactions against the modern Scribes have been different in different parts of the world. The Reform in Germany and Ḥasidhism in southern Russia, different as they are in externals, are alike protests against exaltation of the letter; and finally a third movement opposed to both of these is also a mark of the progress from the glossatorial to the commentatorial stage, from the stage where growth is by fiction to the stage where growth is by equity. Rabbi Elijah of Wilna was opposed to the pilpul and substituted a method of teaching that looked to the sense rather than the words. I quote Mr. J. D. Eisenstein: [75]

"The Reform movement on the one side and the ensnaring hasidic tendencies on the other caused the pupils of the Wilna Gaon to deliberate how they might preserve the true Jewish learning and perpetuate the method and style of study inaugurated by the Gaon, who was rather opposed to the pilpul and hillukim [disquisitions] as practiced in the Yeshibot of Poland. With this aim Rabbi Hayyim the chief disciple of the Gaon, organized in 1803 the celebrated Yeshibah [Rabbinic school] at Volozhin."

The significance of Elijah ben Solomon, the "gaon" of Wilna, is just coming to be understood. Never having studied at any *Y^eshībhōth,* never prejudiced by the perverted methods of study then in vogue, he escaped casuistry. His pupils had to pursue the same plain and simple methods of study that he followed. Though he himself founded no school, his lessons were gradually learned by the Jews of the world. Volozhin became the model of the Y^eshībhōth of Poland and surrounding countries, of Palestine and of America. One or two instances of the modernizing tendencies of these Y^eshībhōth may be interesting. The Y^eshībhāh of the late Rabbi Reines of Lida included modern

[75] 12 Jew. Encyc. 598, *s. v.* "Yeshibah."

subjects in its curriculum, as does Y^{e}shībhath Rabbi Isaac Elhanan, of New York. Meanwhile, the neo-orthodoxy of western Europe and America has been occupied with a restatement of its whole position, in which equity surely predominates over pilpul. Even Rabbi Isaac Elhanan Spektor, the late leader of modern Russo-Polish orthodoxy and a supporter of the Volozhin Yeshibhah, joined hands with the movement in the West, when he urged Samson Raphael Hirsch, the father of neo-orthodoxy, to write his *"Über die Beziehung des Talmuds zum Judenthum."*

. . . . . .

To go further would be to tread the halls of living men—or even to pierce the veil of the future. I shall do neither. Even if it were possible, it would be irreverent to gaze with too curious an eye upon the mystery of the continuity of Jewish life through the adverse ages—or upon the related mystery of the continuity of any people's law as an expression of its own national life and aspirations.

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